



Informational Guide to Model Hearing Procedures for Appraisal Review Boards

December 4, 2013
Property Tax Assistance Division
Texas Comptroller of Public Accounts

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Introduction

Effective Jan. 1, 2014, Tax Code Section 5.103(a) requires that the Comptroller of Public Accounts prepare model hearing procedures for appraisal review boards (ARB). The model procedures are required to be followed, according to subsection (d), when an ARB establishes its hearing procedures, as required by Tax Code Section 41.66(a).

Tax Code Section 5.103(b) lists 17 topics, 16 of which are addressed in the model hearing procedures under the categories of (1) ARB membership, (2) ARB duties, (3) ARB hearings, (4) conduct of ARB hearings, and (5) evidence considerations. The last statutorily-required topic—"any other matter related to fair and efficient appraisal review board hearings"—is addressed under the last section entitled "Other Issues."

The model procedures address specific matters required by Tax Code Section 5.103. An ARB may include additional procedures in its local hearing procedures regarding legal and administrative matters that are not addressed by these model procedures. Input from ARB legal counsel is advisable to establish local hearing procedures. The local procedures, however, may not contradict, negate, or otherwise substantively change the model procedures. If a conflict exists between the model procedures and local procedures, the model procedures prevail.

This informational guide is provided to aid ARBs in understanding the legal bases of the model procedures and to provide samples of additional or modified procedures that follow the model procedures, but do not contradict, negate, or otherwise substantively change them. The Comptroller's Property Tax Assistance Division is providing this guide solely as an informational resource. It is the model procedures that are required by statute and that must be followed by ARBs in establishing procedures under Tax Code Section 41.66(a). The legal provisions included in this guide are not exhaustive and the sample procedures are only illustrative. In providing sample procedures in this guide, the Comptroller neither advocates that an ARB establish such sample procedures, nor takes a position with regard to whether such provisions are advisable or legally enforceable. Those decisions should be made with advice of ARB legal counsel. The information provided in this guide neither constitutes nor serves as a substitute for legal advice. Questions regarding applicable statutes or additions or modifications to the model procedures should be directed to ARB legal counsel.

I. ARB Membership

[Tax Code Section 5.103(b)(16), (15), and (12)]

Tax Code Section 6.41(a) establishes an appraisal review board (ARB) for each appraisal district. Subsection (b) requires that the board must have at least three members. The appraisal district board of directors by resolution may increase the size of the ARB to an appropriate number. Subsection (d) provides that, except as provided by Subsection (d-1), ARB members are appointed by resolution of a majority of the board of directors.

Tax Code Section 6.414(a) permits boards of directors to provide “for a number of auxiliary appraisal review board members that the board considers appropriate to hear taxpayer protests . . . and to assist the board in performing its duties.” Subsection (g) states that “appraisal review board member” includes an auxiliary ARB member.

Beginning in 2014, in a county with a population of 120,000 or more, ARB members, including auxiliary ARB members, are appointed by the local administrative district judge. Tax Code Section 6.41(d-1) states that the members of the ARB are appointed by the judge. If the appraisal district board of directors provides for the existence of auxiliary ARB members in counties with populations of 120,000 or more, the local administrative law judge must appoint those members, as well as regular ARB members [Tax Code Section 6.414(b)].

Subsection (d-1) also states that “all applications submitted to the appraisal district or to the appraisal review board from persons seeking appointment as a member of the appraisal review board shall be delivered to the local administrative district judge. The appraisal district may provide the local administrative district judge with information regarding whether an applicant for appointment to or a member of the board owes any delinquent ad valorem taxes to a taxing unit participating in the appraisal district.”

Applications are not required from persons seeking appointment to an ARB by the board of directors in counties with populations of less than 120,000; however, they may be requested by the board of directors to assist it in making appointments.

Tax Code Section 6.41(c) requires that an individual must be a resident of the appraisal district and must have resided in the district for at least two years in order to be eligible for appointment to an ARB. This eligibility requirement exists regardless of the county population.

Tax Code Section 5.041(e-2) requires each ARB member who is in the second year of his/her first term or has been reappointed to a subsequent term to complete the required training offered by the Comptroller of Public Accounts annually. An ARB member may not participate in a hearing, vote on a protest determination, or be reappointed to an additional term until the person completes the training and receives a certificate of course completion.

A. Administration of ARB Appointments

Tax Code Section 6.41(d) – (d-9) addresses appointment of ARB members. Section 6.41(d) sets forth the general rule that ARB members are appointed by resolution of a majority of the appraisal district board of directors. Section 6.41(d-1) – (d-9) provides for appointment of ARB members by the local administrative district judge in counties with a population of 120,000 or more. Neither the ARB nor its members have any statutory role in the ARB appointment process. Additionally, in appraisal districts in which ARB members are appointed by the local administrative district judge, Section 6.41(i)

expressly prohibits communication by an ARB member with the judge regarding the appointment of ARB members. Pursuant to Section 6.41(k), a violation of the prohibition in Section 6.41(i) is a Class A misdemeanor.

B. Conflicts of Interest

1. Tax Code Provisions

The term “conflict of interest” is used generally with regard to public officials and fiduciaries and their relationships to matters of private interest or gain to them. As the term relates to the duties of ARB members, statutory provisions outline restrictions.

Considered a restriction on eligibility of ARB members, Tax Code Section 6.412(c) prohibits members of the board of directors, an officer, or employee of the appraisal district, an employee of the comptroller, or a member of the governing body, officer, or employee of a taxing unit from serving on an ARB. This eligibility requirement must be investigated carefully so that appointments are not made to the ARB if such a conflict exists. If a conflict arises due to employment or appointment to one of the prohibited positions after appointment to the ARB, the member must resign from the ARB immediately.

Also a restriction on eligibility of ARB members, Tax Code Section 6.413 deals with interests in certain contracts. A person cannot serve on an ARB if the member or a business entity in which the member has a substantial interest is a party to a contract with the appraisal district or with a taxing unit that participates in the district. Likewise, the appraisal district or a taxing unit may not enter into a contract with a member of an ARB or with a business entity in which the ARB member has a substantial interest.

“Substantial interest” is defined in subsection (d). This eligibility requirement should be investigated before ARB member appointment. If an ARB member discovers a conflict after his/her appointment, the member must resign from the ARB or disengage from the contract creating the conflict immediately.

Tax Code Section 41.69, which is entitled “Conflict of Interest,” provides direct guidance regarding conflicts of interest as they relate to protest hearings. It states that “a member of the appraisal review board may not participate in the determination of a taxpayer protest in which he is interested or in which he is related to a party by affinity within the second degree or by consanguinity within the third degree, as determined under Chapter 573, Government Code.”

To restate, Section 41.69 prohibits participation in a protest hearing if the ARB member is interested in the protest in any way or if the ARB member is related to a party in a protest hearing by affinity within the second degree or by consanguinity within the third degree (see chart of kinship in the *Appraisal Review Board Manual*). An ARB member may be removed from the board due a violation of this provision [Tax Code 6.41(f)(1)].

2. Local Government Code Provisions

Tax Code Section 6.413(f) provides that “this section does not limit the application of any other law, including the common law relating to conflicts of interest, to an appraisal review board member.” Not just Tax Code provisions determine conflicts of interest. ARB members may wish to review publications regarding conflicts of interest that are published by the Texas Attorney General (AG) and available on the AG’s website. Questions regarding laws regarding conflict of interest should be directed to ARB legal counsel or, as applicable, your personal legal counsel.

One example of legal restrictions regarding conflicts of interest found outside the Tax Code is Local Government Code Chapter 171. Local Government Code Chapter 171 defines “local public official” to include elected or appointed officer “who exercises responsibilities beyond those that are advisory in nature.” If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if (1) the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public, or (2) it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of real property, distinguishable from its effect on the public. The affidavit must be filed with the official record keeper of the governmental entity.

“Substantial interest” is defined for purposes of Chapter 171. Under Chapter 171, a person has a substantial interest in a business entity if he/she (or a person related in the first degree by consanguinity or affinity as determined under Government Code Chapter 573) owns 10 percent or more of the voting stock or shares of the entity, or owns either 10 percent or more or \$15,000 of the fair market value of the business entity; or funds received by the person from the business entity exceed 10 percent of the person’s gross income for the previous year. A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.

If a local public official is required to file and does file an affidavit of conflict of interest, he/she is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action. (Local Government Code Section 171.004)

A violation of these provisions is a Class A misdemeanor.

C. Ex Parte and Other Prohibited Communications

1. Tax Code Section 41.66(g)

Tax Code Section 41.66(g) states:

“At the beginning of a hearing on a protest, each member of the appraisal review board hearing the protest must sign an affidavit stating that the board member has not communicated with another person in violation of Subsection (f). If a board member has communicated with another person in violation of Subsection (f), the member must be recused from the proceeding and may not hear, deliberate on, or vote on the determination of the protest. The board of directors of the appraisal district shall adopt and implement a policy concerning the temporary replacement of an appraisal review board member who has communicated with another person in violation of Subsection (f).”

Tax Code 41.66(f) prohibits communications between appraisal review board members and other persons concerning the following matters:

- the evidence, argument, facts, merits, or any other matters related to an owner’s protest, except during the hearing on the protest; or
- a property that is the subject of the protest, except during a hearing on another protest or other proceeding before the board at which the property is compared to other property or used in a sample of properties.

If an ARB member has communicated in this manner, the member may not participate in a protest hearing. The ARB member must recuse himself or herself immediately from the hearing and report the matter to the chairman or secretary of the ARB.

In the recusal process, the ARB member not only may not vote on the matter that is the subject of the protest, but also may not hear or deliberate on the determination of the protest.

As noted above, the board of directors of the appraisal district, pursuant to Tax Code Section 41.66(f), must adopt and implement a policy concerning the temporary replacement of an ARB member who has communicated with another person in violation of Section 41.66(f).

A violation of Tax Code Section 41.66(f) is a Class A misdemeanor [Section 6.411(a) and (d)]. In addition, an ARB member may be removed from the board due a violation of this provision [Tax Code 6.41(f)(1)].

2. Tax Code Section 6.411

Subsection (b) prohibits communications between the chief appraiser or other employee of the appraisal district, a member of the board of directors, a property tax consultant, or an attorney representing a party to a proceeding before an ARB and a member of the ARB. These communications must be made “with the intent to influence a decision” of the ARB.

This prohibition does not apply to communications between:

- the ARB and its legal counsel; or
- the ARB and the chief appraiser, another employee of the appraisal district, a member of the board of directors, a property tax consultant, or an attorney representing a party to a proceeding before the ARB (1) during a hearing, (2) socially, (3) that are limited to administrative, clerical, or logistical matters related to scheduling and operation of hearings, processing documents, issuance of order, notices or subpoenas, and the operation, appointment, composition, or attendance at ARB training; or (4) that are required for the board of directors to determine whether to appoint, reappoint, or remove a person as a member or the chairman or secretary of the ARB.

A violation of this provision is a Class A misdemeanor.

3. Tax Code Section 6.41(i) and (j)

The chief appraiser or other employee or agent of the appraisal district is prohibited from communicating with an ARB member, a member of the district board of directors, or the local administrative law judge (in counties with populations of 120,000 or more) regarding “a ranking, scoring, or reporting of the percentage by which the appraisal review board or a panel of the board reduces the appraised value of property.”

[Subsection (j)] An ARB member is prohibited from communicating with the local administrative district judge regarding the appointment of ARB members in counties with populations of 120,000 or more. [Subsection (i)] Violations of these provisions are Class A misdemeanors.

Prohibitions regarding communications with administrative district judges in counties with populations of 120,000 or more do **not** apply to communications between ARB members and the judges regarding their reappointment to the ARB.

II. ARB Duties

[Tax Code Section 5.103(b) (1), (5), and (6)]

A. Statutory Duties of an ARB

1. Tax Code Section 41.01

- (a) The appraisal review board shall:
 - (1) determine protests initiated by property owners;
 - (2) determine challenges initiated by taxing units;
 - (3) correct clerical errors in the appraisal records and the appraisal rolls;
 - (4) act on motions to correct appraisal rolls under Section 25.25;

- (5) determine whether an exemption or partial exemption is improperly granted and whether land is improperly granted appraisal as provided by Subchapter C, D, E, or H, Chapter 23; and
 - (6) take any other action or make any other determination that this title specifically authorizes or requires.
- (b) The board may not review or reject an agreement between a property owner or the owner's agent and the chief appraiser under Section 1.111(e).

Statutory mandates for ARB actions deal with these duties (see Tax Code Chapters 41 and 25). The law authorizes actions for an ARB to take, such as establishing hearing procedures [Section 41.66(a)] and making determinations of protests and motions. By signing the statement at the conclusion of the training provided by the Comptroller of Public Accounts, members of the ARB acknowledge that they will comply with the duties prescribed by law for them [Tax Code Section 5.041(b-1)].

2. Deadlines for Completing Statutory Duties

Tax Code Section 41.12 provides the deadlines and steps that must be taken in order for the ARB to complete its duties. By July 20, all or substantially all timely filed protests and challenges must be heard and determinations made. By the same date, changes in the appraisal records must be submitted to the chief appraiser and the appraisal records must be approved. In counties with populations of at least one million, the deadline can be postponed, with approval of the appraisal district board of directors, until August 30. The board of directors in counties with populations of at least one million may also authorize the ARB to approve the records "if the sum of the appraised values, as determined by the chief appraiser, of all properties on which a protest has been filed but not determined does not exceed 10 percent of the total appraised value of all other taxable properties."

B. Notices Required under the Property Tax Code

Numerous notices are required to be provided either by the chief appraiser or the ARB to members of the public or individual property owners. Other notices are required to be given to the appraisal office or the ARB by property owners.

The following is a list of required notices. Other notices may exist, and the fact that they are not included on this list is not an indication that they are not required. This non-exclusive list includes notices to:

- Re-apply for an exemption of raw cocoa and green coffee Section 11.33(b)
- Re-apply for exemptions Section 11.43(c)
- Cancel exemptions Section 11.43(h)
- Re-apply for stored cotton exemption Section 11.437(b)
- Apply for exemptions required annually Section 11.44(a)
- Modify or deny exemptions Section 11.45(d)

• Apply annually for agricultural land appraisal	Section 23.43(e)
• Determine results of a report of decreased value	Section 22.03(c)
• Render value of business personal property	Section 22.22
• Deny agricultural land appraisal application	Section 23.44(d)
• Impose additional taxes for change of use of land designated as agricultural land	Section 23.46(c)
• Deny open-space land appraisal application	Section 23.57(d)
• Deny timber land appraisal application	Section 23.79(d)
• Deny recreational, park, or scenic land appraisal application	Section 23.85(d)
• Deny public access airport appraisal application	Section 23.95(d)
• Re-apply for open-space land appraisal	Section 23.54(e)
• Re-apply for timber land appraisal	Section 23.75(e)
• Re-apply for recreational, park, or scenic land appraisal	Section 23.84(c)
• Re-apply for public access airport appraisal	Section 23.94(c)
• Deny public access airport appraisal application	Section 23.95(d)
• Re-apply for restricted-use timber appraisal	Section 23.9804(f)

Also included in this non-exclusive list are notices of:

• Determination of sale of property before completion of replacement structure after a disaster	Section 11.135(e)
• Penalty for not continuing use of certain property for low-income housing	Section 11.181(g)
• Requirement to provide inventory records to determine value of Freeport goods	Section 11.251(h)
• Penalty for failing to respond to notice concerning Freeport exemption	Section 11.251(h)
• Requirement to provide property records to determine value of goods-in-transit	Section 11.253(h)
• Penalty for late Freeport exemption application	Section 11.4391(c)
• Penalty for delinquent rendition report/statement	Section 22.28(a)
• Denial of rendition penalty waiver request	Section 22.30(a-1)
• Determination of refund request for fleet transaction	Section 23.1243(c)
• Penalty for late application for agricultural designation	Section 23.431(c)
• Penalty for failure to notify chief appraiser of end of tick quarantine	Section 23.48(g) & Section 23.60(g)
• Penalty for failure to notify chief appraiser of loss of open-space land appraisal eligibility	Section 23.54(i)
• Penalty for late open-space land application	Section 23.541(c)
• Change of use of open-space land	Section 23.55(e)
• Penalty for failure to notify chief appraiser of loss of timber-land appraisal eligibility	Section 23.75(i)

• Penalty for late filing of timber land appraisal application	Section 23.751(c)
• Change of use of timber land	Section 23.76(e)
• Denial of timber land application	Section 23.79(d)
• Denial of application for recreational, park, and scenic land appraisal	Section 23.85(d)
• Penalty for violating deed restrictions: recreational, park, and scenic land appraisal and for public access airport appraisal	Section 23.87(b) Section 23.97(b)
• Penalty for failure to notify chief appraiser of end of eligibility for restricted-use timber appraisal	Section 23.9804(j)
• Denial of application for restricted-use timber appraisal	Section 23.9805(d)
• Change of use of restricted-use timber land	Section 23.9807(f)
• Value for rolling stock	Section 24.35(a)
• Qualification or cancellation of separate taxation for certain improvements	Section 25.08(d)
• Qualification or cancellation of separate taxation of standing timber	Section 25.10(d)
• Qualification or cancellation of separate taxation of undivided interests	Section 25.11(c)
• Appraised value of separate mineral interests	Section 25.12(c)
• Appraised values generally	Section 25.19
• Change in appraisal records ordered by the ARB resulting in increased tax liability	Section 41.11
• Protest to ARB by property owner	Section 41.44
• Protest hearing	Section 41.46

C. Remedy for Failure to Provide Required Notice

Property owners have a remedy for the failure of the chief appraiser or the ARB to provide or deliver a notice to which the property owner is entitled. Pursuant to Tax Code Section 41.411, the property owner is entitled to protest the failure to the ARB to provide or deliver required notices. If failure to provide or deliver the notice is established, the ARB shall determine the protest on any other grounds of protest authorized by law relating to the property to which the notice applies. The property owner must pay his/her taxes according to the requirements of Tax Code Section 41.4115.

- Sample Procedure for ARB Consideration of Failure to Provide Notice Protests

When a property owner files a protest pursuant to Tax Code Section 41.411 that a notice to which the owner is entitled has not been delivered, the chairman of the ARB must notify its attorney to provide an analysis of the notice that is claimed not to have been delivered, investigate the facts of the protest, and provide legal advice as required by Tax Code Section 6.43(d).

The hearing must be bifurcated. The ARB must first determine if the notice is one that is required by law. If it is, the ARB must determine if it was delivered according to Tax Code Section 1.07 or, if applicable, Section 1.085. If the notice was not properly delivered, the ARB must determine if taxes were paid as required by law. After these jurisdictional determinations are made and it is determined that the property owner is entitled to a hearing, the protest may be determined on its merits at that time and without postponement, unless the parties agree that the hearing on the protest merits should be postponed. “If failure to provide or deliver the notice is established, the appraisal review board shall determine a protest made by the property owner on any other grounds of protest authorized by this title relating to the property to which the notice applies.” [Tax Code Section 41.411(b)]

D. Determination of Good Cause under Tax Code Sections 41.44(b)

Tax Code Section 41.44(b) provides:

“A property owner who files his notice of protest after the deadline prescribed by Subsection (a) of this section but before the appraisal review board approves the appraisal records is entitled to a hearing and determination of the protest if he shows good cause as determined by the board for failure to file the notice on time.”

This provision permits the ARB to allow a late-filed protest to be heard and a determination made if good cause is shown.

“Good cause” is a term that is defined in Tax Code Section 41.45(e-2) for purposes of postponement requests under Tax Code Section 41.45(e) and requests for new hearings due to failure to appear under Tax Code Section 41.45(e-1). “Good cause” under Tax Code Section 41.44(b) is not defined.

Under Tax Code Section 41.45(e-2), “good cause” is defined as “a reason that includes an error or mistake that: (1) was not intentional or the result of conscious indifference; and (2) will not cause undue delay or other injury to the person authorized to extend the deadline or grant a rescheduling.”

When making a determination regarding good cause under Tax Code Sections 41.45(e) or 41.45(e-1), each element of the definition must be considered on a case-by-case basis by the ARB. These elements are:

- an error or mistake;
- unintentional or not the result of conscious indifference; and
- no undue delay or other injury to the ARB (e.g. scheduling problems with hearings).

In making determinations regarding claims of good cause for accepting late-filed protests under Tax Code Section 41.44(b), the ARB may wish to implement local standards to provide for a uniform method of consideration, just as there is a uniform method

provided in the statute for postponed and new hearings under Sections 41.45(e) and 41.45(e-1). The ARB should consult with its legal counsel to take steps or implement additional procedures as necessary or advisable to ensure that claims of good cause under Tax Code Section 41.44(b) are carefully considered to maintain statutory filing deadlines and standards in making determinations of good cause are uniformly applied.

III. ARB Hearings (formal hearings, not informal meetings between property owners and appraisal district staff)

[Tax Code Section 5.103(b)(3), (4), (7), and (14)]

A. Scheduling of Hearings

When a timely notice of protest is filed, the ARB is required to schedule a hearing. The ARB has no authority to refuse to schedule a hearing for a timely filed protest. Scheduling of hearings is considered a clerical function that may be performed by the staff of the appraisal district as provided by Tax Code Section 6.43(f) with direction and final decision-making by the ARB chairman or an ARB member designated by the chairman [Section 41.66(o)].

If more than one protest is filed related to the same property, a single hearing on all timely filed protests related to the property must be scheduled. A single hearing for a property owned by an undivided or fractional interest, including separate interests in minerals in place, shall be scheduled to allow all owners who have filed timely protests to participate. [Tax Code Section 41.45(a)]

Tax Code Section 41.71 requires that the ARB shall provide for hearings on protests in the evening or on a Saturday or Sunday.

- **Sample Procedure for Affidavits of Appearance at Hearings**

Property owners who file affidavits of appearance are required to state in the affidavits whether or not they intend to appear at the hearing and that the affidavit may be used only if they do not appear at the hearing. If the affidavit indicates that the property owner will not appear at the hearing or does not state that he or she will appear, “the appraisal review board is not required to consider the affidavit at the scheduled hearing and may consider the affidavit at a hearing designated for the specific purpose of processing affidavits.” [Tax Code Section 41.45(n)]

- **Sample Procedure for ARB Panel Assignments and Hearing and Rehearing Schedules**

If an ARB sits in panels as authorized by Tax Code Section 41.45(d), protests shall be assigned randomly, except that the ARB chairman with clerical assistance from the staff of the appraisal district [see Section 6.43(f)] may consider the type of property or the

protest grounds in order to assign the protest to a panel with members who have particular expertise.

Once a protest is scheduled to be heard by a specific panel, it shall not be reassigned to another panel without the consent of the property owner or a designated agent. If cause exists to reassign a panel, the owner or designated agent may agree to the reassignment or request a postponement of the hearing. The ARB is required to postpone the hearing if requested in this situation. “A change of members of a panel because of a conflict of interest, illness, or inability to continue participating in hearings for the remainder of the day does not constitute reassignment of a protest to another panel.” [Tax Code Section 41.66(k)]

Membership for ARB panels or the chairmanship of a panel may not be based on an ARB member’s voting record in previous protests. [Tax Code Section 41.66(m)]

“If the recommendation of a panel is not accepted by the board, the board may refer the matter for rehearing to a panel composed of members who did not hear the original hearing or, if there are not at least three members who did not hear the original protest, the board may determine the protest. Before determining a protest or conducting a rehearing before a new panel or the board, the board shall deliver notice of the hearing or meeting to determine the protest in accordance with provisions of this subchapter.” [Tax Code Section 41.45(d)]

B. Postponement of ARB Hearings and Determinations of Good Cause

The model procedures include procedures for postponements under Tax Code Sections 41.45(e), 41.45(e-1), 41.45(g), 41.66(h), 41.66(i), and 41.66(k). The provisions set forth in the Tax Code regarding postponement of hearings vary. Questions regarding applicability and legal requirements of the various provisions should be directed to ARB legal counsel.

As discussed above, some postponements, by law, may only be granted upon a showing of good cause. As noted, “good cause” is defined in Tax Code Section 41.45(e-2) for purposes of postponement requests under Tax Code Section 41.45(e) and requests for new hearings due to failure to appear under Tax Code Section 41.45(e-1). “Good cause” is not defined in the Tax Code for purposes of permitting late-filed protests authorized by Section 41.44(b).

- Sample Procedure for Postponements due to Failure to Comply with Tax Code Section 41.461

The ARB shall postpone a hearing (one time only) if the property owner requests additional time to prepare for the hearing and establishes that the chief appraiser failed to comply with Tax Code Section 41.461. Only the property owner may request a postponement for this reason. [Tax Code Section 41.66(h)]

To obtain a postponement, the property owner must request additional time to prepare for the hearing and establish that the chief appraiser (1) failed to deliver a copy of the Comptroller's publication *Property Taxpayer Remedies* to the owner, or to a designated agent if requested by the agent; (2) failed to inform the property owner or agent that he/she may inspect and obtain a copy of information that the chief appraiser plans to introduce at the hearing; or (3) failed to deliver a copy of the local ARB hearing procedures, 14 days before the protest hearing. The information that might be used as evidence is not required to be delivered 14 days before the hearing. The property owner must only be informed that the information may be inspected and a copy obtained in order to establish compliance this provision. The property owner's request for postponement must be denied if failure to comply with this requirement is not established.

IV. Conduct of ARB Hearings (formal hearings, not informal meetings between property owners and appraisal district staff)

[Tax Code Section 5.103(b)(2), (9), and (10)]

A. Process for Conducting Hearings

Tax Code Section 41.66(b) provides that "to the greatest extent practicable" hearing procedures shall be informal. This mandate is particularly important to the process for conducting hearings. Pursuant to Section 41.66(a), hearing procedures must be provided, if requested by a protesting party, on or before the date the notice of protest is filed. They must be delivered not later than the 10th day before the ARB hearing and may be delivered with the notice of protest hearing. This legal requirement is in addition to the requirements of Tax Code Section 41.461. A copy of the hearing procedures, which must follow the Comptroller's model procedures, is required to be posted in a prominent place in each room where ARB hearings are held.

ARB hearings are open to the public, according to Tax Code Section 41.66(d). Exceptions exist in subsections (d-1) and (d-2). Notwithstanding Government Code Chapter 551 (the Open Meetings Act), the ARB is required to conduct a hearing that is closed to the public, if the property owner or the chief appraiser intends to disclose proprietary or confidential information at the hearing to assist the ARB in making its determination **and** if there is a joint motion by the property owner and the chief appraiser. The proprietary or confidential evidence presented at the hearing giving rise to the closed hearing is confidential according to Tax Code Section 22.27.

- **Sample Procedure for Conducting Hearings Closed to the Public**

Prior to the scheduled hearing time, a joint motion by the chief appraiser and the property owner must be filed with the ARB in writing to request that the hearing be closed because of an intent to disclose proprietary or confidential information that will assist the ARB in

determining the protest. The hearing shall be conducted in the manner required by Government Code Subchapter E, Chapter 551, relating to closed meetings.

The ARB or panel chairman shall convene the hearing as an open meeting and then announce that the meeting will be closed to the public as permitted by Tax Code Sections 41.66(d) and (d-1). Only the parties to the protest, including witnesses, and the ARB members are permitted to stay in the hearing room. The same order as for hearings open to the public should be followed.

The secretary of the ARB is responsible for ensuring that a separate tape recording or certified agenda is kept for the closed meeting according to the requirements of Government Code Section 551.103. The proprietary or confidential evidence presented at the hearing giving rise to the closed hearing is confidential according to Tax Code Section 22.27 shall be stamped as “confidential” and retained separately in the ARB records. The confidentiality of the documents and their content must be maintained by the ARB members. After deliberation, the ARB shall reconvene in open meeting and vote or take final action on the protest deliberated in the closed meeting (see Government Code Section 551.102).

B. Right to Examine and Cross-Examine Witnesses or Other Parties

Tax Code Section 41.66(b) states that “each party to a hearing is entitled to offer evidence, examine or cross-examine witnesses or other parties, and present argument on the matters subject to the hearing.” The ARB may not prohibit this entitlement in any way; however, it may enforce time limits and dictate the order of ARB hearings for witness examination and cross-examination.

The model procedures for conducting hearings provide for the orderly presentation of evidence and examination and cross-examination of witnesses or other parties.

C. Party’s Right to Appear by an Agent

Tax Code Section 41.66(c) provides that “a property owner who is entitled as provided by this chapter to appear at a hearing may appear by himself or by his agent.” The representation of property owners at protest hearings is governed by Tax Code Section 1.111 and Comptroller Rule 9.3044. Subsection (i) of Tax Code Section 1.111 requires an ARB to accept and consider a motion or protest filed by an agent if an agency authorization is filed at or before the hearing on the motion or protest. The ARB may not require that an agency authorization be filed at an earlier time. In addition, subsection (g) states that “an appraisal district, appraisal review board, or taxing unit may not require a person to designate an agent to represent the person in a property tax matter other than as provided by this section.”

V. Evidence Considerations

[Tax Code Section 5.103(8), (11), and (13)]

A. A Party's Right to Offer Evidence and Argument

Tax Code Section 41.45(b) states that “the property owner initiating the protest is entitled to an opportunity to appear to offer evidence or argument.” Subsection (h) requires, before the hearing on the protest or immediately after the hearing begins, that the chief appraiser and the property owner or the property owner’s agent exchange copies of written materials that they intend to offer or submit to the ARB. Each party to a hearing is entitled to offer evidence, examine or cross-examine witnesses or other parties, and present argument on the matters subject to the hearing. [Tax Code Section 41.66(b)]

A property owner, attorney, or agent offering evidence or argument in support of a protest concerning appraised or market value or unequal appraisal is not subject to Occupations Code Chapter 1103 (the Texas Appraiser Licensing and Certification Act), unless the person offering the evidence or argument states that he or she is offering the evidence or argument as an appraiser licensed under those provisions. [Tax Code Section 41.66(l)]

If the person offering the evidence or argument holds a license or certificate from the Texas Appraiser Licensing and Certification Board (TALCB), he or she is required to state the capacity in which the person is appearing before the ARB.

The model procedures for conducting a hearing provide for exchanging evidence, offering evidence, examining and cross-examining witnesses or parties, and presenting arguments. Likewise, the model procedures provide for inquiry by the ARB as to applicability of the Texas Appraiser Certification and Licensing Act.

Tax Code Section 41.67(b) provides that copies of documentary evidence may be admitted, if original documents are not readily available. A party is entitled the opportunity to compare a copy with the original document on request.

Tax Code Section 41.67(c) provides that official notice may be taken of any fact judicially cognizable. A party is entitled to an opportunity to contest facts officially noticed. The manner of taking official notice must be determined based on the advice of the ARB legal counsel.

B. Prohibition of Consideration of Information Not Provided at the ARB Hearing

Tax Code 41.66(e) prohibits an ARB from considering “any appraisal district information on a protest that was not presented to the appraisal review board during the protest hearing.” For example, in order for any appraisal district record (i.e., appraisal roll history, appraisal cards) to be presented or considered by the ARB, it must be presented

as evidence by a party, party representative, or witness (e.g. chief appraiser, appraisal district representative, property owner, or agent) at the protest hearing.

The role of the ARB in a hearing is to receive, consider, and make determinations based on evidence provided at the hearing, and following the law in doing so. No provision in the Tax Code provides for the ARB to consider any evidence that is not presented during the hearing. In fact, the Tax Code includes only provisions that prohibit consideration of certain information – like Tax Code Section 41.66(e) discussed above and provisions regarding ex parte communications. Each ARB should discuss with its legal counsel whether the ARB should establish local procedures to supplement the model procedures to address issues that might arise in this context.

C. Exclusion of Evidence Required by Tax Code Section 41.67(d)

Tax Code Section 41.67(d) states:

“Information that was previously requested under Section 41.461 by the protesting party that was not made available to the protesting party at least 14 days before the scheduled or postponed hearing may not be used as evidence in the hearing.”

Tax Code Section 41.461 states:

- (a) At least 14 days before a hearing on a protest, the chief appraiser shall:
 - (1) deliver a copy of the pamphlet prepared by the comptroller under Section 5.06(a) to the property owner initiating the protest if the owner is representing himself, or to an agent representing the owner if requested by the agent;
 - (2) inform the property owner that the owner or the agent of the owner may inspect and may obtain a copy of the data, schedules, formulas, and all other information the chief appraiser plans to introduce at the hearing to establish any matter at issue; and
 - (3) deliver a copy of the hearing procedures established by the appraisal review board under Section 41.66 to the property owner.
- (b) The charge for copies provided to an owner or agent under this section may not exceed the charge for copies of public information as provided under Subchapter F, Chapter 552, Government Code, except:
 - (1) the total charge for copies provided in connection with a protest of the appraisal of residential property may not exceed \$15 for each residence; and
 - (2) the total charge for copies provided in connection with a protest of the appraisal of a single unit of property subject to appraisal, other than residential property, may not exceed \$25.

For evidence to be excluded under Tax Code Section 41.67(d), the evidence presented at the hearing must establish that: (1) the information sought to be excluded as evidence was

not made available at least 14 days before the hearing; and (2) the information sought to be excluded as evidence was previously requested by the protesting party.

It is important to note that Section 41.461 does not require the information that the chief appraiser plans to introduce at the hearing be delivered 14 days before the hearing. The property owner or agent must only be informed that the information may be inspected and a copy obtained. The only provisions in Tax Code Section 41.461 requiring delivery by the chief appraiser 14 days before the hearing are those pertaining to the Comptroller's publication *Property Taxpayer Remedies* and the local ARB hearing procedures.

Also, Tax Code Section 41.461 does not require a request by a protesting party, but Section 41.67(d) does. If 41.67(d) does not apply because there was no timely request for the information set forth in Section 41.461, the ARB may be requested to postpone the hearing under the terms of Section 41.66(h):

“The appraisal review board shall postpone a hearing on a protest if the property owner requests additional time to prepare for the hearing and establishes to the board that the chief appraiser failed to comply with Section 41.461. The board is not required to postpone a hearing more than one time under this subsection.”

VI. Other Issues

[Tax Code Section 5.103(17)]

The model hearing procedures may also include “any other matter related to fair and efficient appraisal review board hearings.” In addition to the model procedures related to this section, two additional issues are addressed here that ARBs may wish to discuss with legal counsel to determine if supplemental local procedures are warranted or might be helpful: weighing evidence and orders determining protest.

A. Weighing Evidence

1. Burden of Proof Requirements in the Tax Code

Tax Code Section 41.43(a) provides that the appraisal district has the burden of establishing the value of property by a preponderance of the evidence presented at the hearing in protests involving excessive value and unequal appraisal. Protests involving other matters that can be the subject of a protest, such as ownership and exemptions, require that the protesting party must establish its position by a preponderance of the evidence [see, e.g., Tax Code Section 41.43(d)]. If the party with the burden of proof does not meet its burden of proof, the protest shall be determined in favor of the other party. Several exceptions to the “preponderance of the evidence” standard exist including, but not limited to:

- a. Section 41.43(a-1) provides that the appraisal district's burden shifts to clear and convincing evidence in protests concerning the market or appraised value of \$1 million or less if a report prepared by a certified appraiser is filed with the ARB and delivered to the chief appraiser more than 14 days before the hearing. The appraisal must meet certain requirements in order to be valid (Subsection a-2). If the appraisal district does not meet its burden of proof, the protest shall be determined in favor of the property owner.
- b. Section 41.43(a-3) requires that the appraisal district must establish by clear and convincing evidence the value of the property if: (1) the appraised value of the property was lowered under Subtitle F of the Tax Code in the preceding year (Subtitle F includes protests filed with the ARB, binding arbitration, and lawsuits); (2) the appraised value of the property in the preceding year was not established as a result of a written agreement between the property owner or the owner's agent and the appraisal district under Section 1.111(e); and (3) not later than the 14th before the date of the first day of the hearing, the property owner files with the ARB and delivers to the chief appraiser information (such as income and expense statements regarding comparable sales), that is sufficient to allow for a determination of the appraised or market value of the property if the protest concerns excessive value, or information that is sufficient to allow for a determination of whether the property was appraised unequally if the protest concerns unequal appraisal. If the appraisal district does not meet its burden of proof, the protest shall be determined in favor of the property owner.
- c. Section 41.43(d) provides an exception that shifts the burden of proof to the property owner if, before the date of the hearing, a rendition statement or property report required by Tax Code Chapter 22 or a response to a chief appraiser's request for information under Section 22.07(c) is not delivered. The property owner then has the burden of establishing value of the property by a preponderance of the evidence. If the property owner fails to meet the standard, the protest shall be determined in favor of the appraisal district.
- d. Section 23.01(e) provides that if the appraised value of property is lowered under Subtitle F of the Tax Code in the preceding year (Subtitle F includes protests filed with the ARB, binding arbitration, and lawsuits), the appraised value may not be increased in a subsequent year by the chief appraiser "unless the increase by the chief appraiser is reasonably supported by substantial evidence when all of the reliable and probative evidence in the record is considered as a whole." If the appraised value is determined based on a protest of unequal appraisal, "the chief appraiser may satisfy the requirement to reasonably support by substantial evidence an increase in the appraised value of the property in the following year by

presenting evidence showing that the inequality in the appraisal of property has been corrected with regard to the properties that were considered in determining the value of the subject property. The burden of proof is on the chief appraiser to support an increase in the appraised value of property under the circumstances described by this subsection.”

2. Standards for Burden of Proof

Pattern jury charges in Texas provide one source of guidance concerning the meaning of two standards for appraisal districts to meet their burden of proof:

The term “preponderance of the evidence” means the greater weight and degree of credible evidence admitted in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that a fact is more likely true than not true.

“Clear and convincing evidence” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

“Substantial evidence” is defined in Black’s Law Dictionary as “such evidence that a reasonable mind might accept as adequate to support a conclusion.”

ARBs may wish to consider these standards in applying the law and in drafting supplemental procedures.

- Sample Procedure Regarding Burden of Proof

If a statutorily required burden of proof is met by the party bearing such burden, the ARB must make determinations based on the weight of the evidence presented by both parties. Meeting the burden of proof standard does not automatically cause the party with the burden to prevail. In addition, the ARB cannot make its own calculations and determinations of value without regard to the evidence. It must rely solely on the evidence presented at the hearing and weigh the evidence presented by both parties. This responsibility requires that the ARB consider the credibility and reliability of the witnesses and other evidence.

B. Orders Determining Protest

Tax Code Section 41.47(a) states that “the appraisal review board hearing a protest shall determine the protest and make its decision by written order.”

Each issue that is the subject of the protest must be determined separately by the ARB and each determination must be reflected on the written order determining protest. In

addition, the ARB must state in the written order the appraised value of the property as shown on the appraisal records submitted to the ARB by the chief appraiser under Tax Code Section 25.22 or 25.23.

A model order determining protest is prepared by the Comptroller of Public Accounts and posted on the Comptroller's website (Form 50-221). The ARB should provide input to the appraisal district staff, if utilized, in the preparation of the written order determining protest to ensure that each matter protested and determined is shown.